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Before the
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS

Regarding
REDUCING THE REGULATORY BURDEN ON SMALL BUSINESS:
IMPROVING THE REGULATORY FLEXIBILITY ACT

NOVEMBER 15, 2007

Submitted by



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Good morning Chairwoman Velazquez, Ranking Member Chabot and distinguished members of the Committee. Thank you for inviting me to testify this morning on a subject that is of great significance to the men and women who the United States depends upon to move our goods and commodities as well as to keep our nation's economy healthy and vibrant.

My name is Joe Rajkovic. I have been involved with the trucking industry for more than 30 years and currently serve as a Regulatory Affairs Specialist for the Owner-Operator Independent Drivers Association (OOIDA). Prior to joining the staff at OOIDA, I was a small business trucker for over two decades. I owned both my truck and trailer and leased them along with my driving services to a motor carrier.

OOIDA is the national trade association representing the interests of small business trucking professionals and professional drivers on matters that affect their industry. The Association actively promotes the views of small business truckers through its interaction with state and federal regulatory agencies, legislatures, the courts, other trade associations and private entities to advance an equitable business environment and safe working conditions for commercial drivers. OOIDA currently has more than 157,000 members who collectively own and operate more than 250,000 individual heavy-duty trucks.

It was once said "what's good for General Motors is good for the nation." In reality, that should be revised to reference small business. They are the locomotive of growth in our economy.

Small businesses dominate the trucking industry in the United States. One-truck motor carriers represent roughly half the total number of active motor carriers operating in our country while approximately 90 percent of U.S. motor carriers operate 6 or fewer trucks in their fleets. In fact, while there are over 4.5 million trucks registered in Federal Motor Carrier Safety Administration (FMCSA) databases, the largest 100 "for hire" and largest 100 "private" fleets together account for only about 385,000 trucks. Considering that roughly 69 percent of freight tonnage in the United States is moved by truck, it is certainly not a stretch to say that small business truckers are truly the backbone of our nation's economy.

As you can appreciate, OOIDA and the truckers it represents support a safe and efficient industry as well as rules that safeguard our national security interests. However, they expect the federal government to implement regulations with some level of common sense and fairness, and take into consideration the tremendous economic impact and operational burdens that regulations it promulgates may have on the small businesses that drive our economy.

But when it comes to agency action, OOIDA believes that small business issues and regulatory flexibility analyses are, at best, an afterthought in the rulemaking process. I would like to provide you with some examples of how small business concerns were not considered in particular instances of agency action. I would also like to suggest that improvements need to be made to strengthen and expand the Regulatory Flexibility Act so that it better serves its purpose: to require agencies to choose regulatory schemes and rules that achieve their goal in the least burdensome manner on small businesses.

These suggestions include:

- 1) Requiring the Regulatory Flexibility Act to apply to executive branch agency actions beyond rulemakings, such as informal adjudications and pilot programs.**
- 2) Requiring agencies to make more concrete findings of fact and cost analyses on the economic impact of its action on small business.**
- 3) Explicitly requiring agencies to consider the impact of its actions on small businesses who are not those in the regulated community but who are directly affected by agency action.**
- 4) Requiring agencies to periodically request public comment and review the impact of all of its regulatory actions on small businesses, and consider changes to its rules to lessen their impact on small businesses.**
- 5) Requiring federal agencies to make a greater effort to coordinate their regulatory efforts.**

Taking each in turn:

Requiring the Regulatory Flexibility Act to apply to agency actions beyond rulemakings, such as informal adjudications and pilot programs.

At this time, the U.S. Department of Transportation (DOT) is conducting a pilot program permitting Mexico-domiciled trucking companies and truck drivers to operate throughout the United States. The DOT's stated goal is to bring our country into compliance with the North American Free Trade Agreement (NAFTA). Earlier this year the U.S. House of Representatives passed an amendment by voice vote to de-fund this program in the pending FY2008 transportation appropriations bill and the Senate later acted likewise passing a similar amendment with a vote of 75-23. OOIDA has also launched a legal challenge to this program based on the belief that the DOT ignored the legal requirements for establishing a pilot program.

DOT has completely disregarded the impact of its cross-border trucking program on small businesses. OOIDA believes that this program will mean the loss of economic opportunities for thousands of small business truckers in the United States while also jeopardizing the safety and security of their operating environments, namely U.S. highways. Only large motor carriers with the wherewithal to establish operations in Mexico will gain new business opportunities

Until just two months ago, Mexico-domiciled trucking companies and drivers were only permitted to deliver international loads from Mexico to commercial trade zones within the first twenty-five miles of the U.S. border area. U.S.-based drivers would pick up those loads and deliver them to their destination within the United States. DOT's plan is to have

less qualified and lower paid Mexican workers deliver those loads to their destination within the United States. DOT has undertaken no estimate of how many U.S. jobs will be lost to Mexican drivers or how freight rates from which small business truckers are compensated will be affected. The first Mexico-domiciled truck driver permitted to come into the country under the new pilot program was paid 13 cents per mile, less than one-third of what U.S. employee truckers make.

Correspondingly, only large U.S. motor carriers appear to have the resources and infrastructure necessary to have a realistic opportunity to operate and do business in Mexico. OOIDA understands that there are winners and losers in foreign trade agreements. However, this is the first instance that I can think of where U.S. workers face the loss of jobs to foreign workers *on our own soil*.

Under NAFTA, the U.S. promised to permit Mexican motor carriers and drivers to operate within the United States under the *same* conditions as U.S. motor carriers and drivers. But the U.S. DOT has decided to accept Mexican driver compliance with less stringent and fewer commercial driver's licensing, medical qualification, and drug testing standards. Permitting drivers who face fewer and less stringent qualifications to enter the United States simply exacerbates the economic loss to U.S. drivers. This is not what our country agreed to in NAFTA, and U.S. small businesses will be impacted much worse than could have been anticipated by our trade negotiators.

This pilot program is not a rulemaking subject to the Regulatory Flexibility Act. In the parlance of administrative law, it is an informal adjudication. If DOT had been required to review the impact of this program on small businesses in the trucking industry, the public and Congress would have had much more information on which to evaluate the wisdom of its undertaking. Agencies should be required to consider the impact of all of their actions on small business, not just rulemakings.

Requiring agencies to make more concrete findings of fact and cost analyses on the economic impact of its action on small business.

Despite the fact that small businesses make up the overwhelming majority of motor carriers in our country, the Federal Motor Carrier Safety Administration (FMCSA) appears to treat its regulatory flexibility duties as an afterthought, rather than central to its rulemaking processes. An example of this is FMCSA's Electronic-On-Board-Recorder (EOBR) proposal. This is a potentially expensive mandate requiring truck drivers to install new equipment in their vehicle to monitor their compliance with the federal hours-of-service regulations. So far, the agency has provided no analysis to support its conclusion that EOBRs will improve safety and justify their cost.

FMCSA is using a carrot and stick approach to this rulemaking. Unfortunately, their carrots are largely being offered to large motor carriers and the stick is being waived primarily at small business motor carriers. FMCSA recognizes that because EOBRs can possess certain tracking technology, motor carriers with large fleets may find value in adopting such equipment to track and make more efficient use of their trucks and

equipment. For small motor carriers, there would be little or no ancillary business benefit to employing EOBRs. In addition, FMCSA's proposal would mandate a costly system for retrieving, storing and accessing electronic EOBR data at the carrier's place of business.

Under the FMCSA proposal, motor carriers who voluntarily adopt EOBRs will be permitted to comply with less stringent versions of other safety rules. On the other hand, those motor carriers who, through FMCSA audits, are determined to have a poor safety record will be mandated to adopt EOBRs. OOIDA believes that the audit selection methodology being considered by FMCSA will over-select small business motor carriers and under-select large motor carriers. Therefore, under the proposed rule small business carriers will be at greater risk for mandated EOBR use.

OOIDA feels that the agency paid no attention to the impact of the rulemaking as a whole on small businesses. The only impact of the rule on small businesses noted by the agency is the potential cost of equipping the truck with an EOBR. OOIDA believes there may need to be more concrete requirements in the Regulatory Flexibility Act to require agencies to review the impact of its rules on small businesses beyond the obvious costs associated with a regulation.

Explicitly requiring agencies to consider the impact of its actions on small businesses who are not those in the regulated community but who are directly affected by agency action.

Regulations can have an enormous impact on small businesses who are not part the directly regulated community. For example, Occupational Health and Safety Administration (OSHA) rules are intended to place requirements on employers to protect the safety of their employees. Those regulations require employers to place rules and conditions on the actions of all persons in their work place, not just its employees. Approximately ten years ago OSHA created a regulation that requires persons using "powered industrial trucks" to have *site-specific* certification in the safe use of motorized forklifts and other like equipment.

Because long-haul truck drivers can make deliveries to dozens of different locations each year, such certification is all but impossible for truck drivers to obtain. Therefore, as OSHA interpreted its own rule, employers must deny uncertified truck drivers the use of powered equipment to unload their own truck. Therefore, drivers usually have two choices, pay out-of-pocket fees to the receiver to unload the receiver's own freight or use a manual pallet jack to unload it him or herself.

With regard to the first option, requiring someone to pay for unloading help (commonly known as "lumping") is against federal law 49 U.S.C. 14103. In regards to the alternative, it is frequently unsafe to move freight using a manual pallet jack. Freight is routinely stacked high on pallets and in significant weights (as much as 2,500 pounds) with the intentions of it being moved quickly and efficiently by powered equipment.

If a trucker does not have the money to pay off a receiver to unload the receiver's freight, they face an uncompensated physical chore that will likely lead to significant fatigue or even injury. I have personally collapsed, spent a week unable to move and been bedridden as a result of having to manually remove freight because I would not allow myself to be subjected to this sort of extortion. With little hope for attention or relief, small business owners seldom report workplace injury to any agency. Meanwhile, large corporations with vested interests in maintaining the status quo utilize their clout to be appointed to government advisory committees where their interests are anything but pure.

OOIDA has called OSHA on many occasions over the past few years trying to bring their attention to this issue. The standard response we receive is: "You represent owner-operators? Those are independent contractors. Our mission is to protect employees. Sorry we can't help you." Is OSHA's mission so constrained that it is exempt from considering the impact of its rulemaking on the health of non-employees?

Perhaps requiring federal agencies to have small business representation on advisory committees would help resolve such issues. In 2002, OSHA formed a committee to make recommendations on ergonomics to Labor Secretary Elaine Chao. The committee was dominated by accomplished people from academia and industry. There were no small business representatives that likely could have added significant insight to the discussion related to musculoskeletal disorders (MSDs). There was, however, a member of this particular committee from one of the larger receivers who very likely saw an increase in fees paid to its unloaders because of the powered industrial truck regulation. A small business representative would have provided a completely different perspective on these issues and would have encouraged OSHA to look at the impact of its rules outside of its regulated community.

Requiring agencies to periodically request public comment and review the impact of all of its regulatory actions on small businesses, and consider changes to its rules to lessen their impact on small businesses.

Of course, not all of the impacts of federal regulations on small businesses can be anticipated by an agency or the public from reading Federal Register notices. OOIDA believes that agencies must be required to invite public comment on a periodic basis to understand the impact of its rules and regulatory actions on small businesses. They should be required to consider and adopt changes to the regulations as well as other programs and agency actions that would be equally or more effective while being less burdensome to small businesses. The OSHA powered industrial truck rule would be one example of a regulation deserving such attention.

Another illustration of the need for periodic public input is the Automated Commercial Environment (ACE) manifest requirement promulgated by the Bureau of Customs and Border Protection (CBP). This regulation requires all truckers to electronically notify the CBP prior to their in-bound (from Canada or Mexico) arrival at the US border. When CBP designed the program they apparently assumed everyone had access to high speed internet. However, while small business truckers play a significant role in facilitating cross-border

trade, they often do not have access to high speed internet, especially when they are on the road.

OOIDA member Keith Jibben from Graceville, Minnesota is a one-truck motor carrier. He operates between the upper Midwest and central to western Canadian provinces. Mr. Jibben often delivers loads to destinations less than 50 miles across the border into Canada. Many of these areas lack any internet accessibility. His wife cannot file his e-manifest because they do not have high speed availability in their hometown area. Mr. Jibben must either use a third-party provider to submit his e-manifests at a cost of \$15-20 per load or take his chances on a friendly border agent not issuing him a fine when he shows up at the border.

This lack of consideration severely handicaps and dissuades small business truckers from competing for cross-border international freight. Mr. Jibben has told me the first fine he gets will be his last because he will opt to discontinue serving the market he has trucked in for decades. Designing a program that essentially excludes those without high-speed internet access is indeed a failure to consider the impact on small businesses. OOIDA believes that many issues such as this could be resolved if agencies were required to annually review the negative impact of their rules on small businesses and were required to periodically consider the adoption of reasonable changes that would reduce that impact.

Requiring federal agencies to make a greater effort to coordinate their regulatory efforts

The jurisdictional separation of federal agencies and even constraints within single agencies can oftentimes be an obstacle to the creation of clear, consistent regulations that would be less burdensome to small businesses. Recent examples reveal this complexity in the implementation of the Hazardous Materials Endorsement (HME) and Transportation Workers Identification Credential (TWIC), both of which are under the direction of the Department of Homeland Security, but with the Transportation Security Administration (TSA) in the lead.

As part of the USA PATRIOT Act of 2001, the TSA was required to implement a Hazardous Materials Endorsement (HME) through state departments of transportation, requiring truckers who haul hazardous materials to undergo background checks at a cost of \$94 to \$129. The HME is obtained through a third-party contractor that is chosen by individual states and the endorsement appears on the truck drivers CDL.

The Transportation Workers Identification Credential (TWIC), required for some truckers today, was created by the Congress through the Maritime Transportation Security Act (MTSA) of 2002. The TWIC program is an initiative of the Transportation Security Administration and the U.S. Coast Guard and also requires background checks in order for a trucker to gain access to certain transportation facilities. The cost of a TWIC card is \$132.50.

To their credit, the Department of Homeland Security (DHS) has determined that the security threat assessments/background checks for obtaining an HME and TWIC are the

same. But to the dismay of truckers who haul hazardous materials and also access certain transportation facilities, there remains a clear disconnect between this determination by DHS and actual implementation by TSA of both of these requirements, creating more redundancy and hurdles for small business truckers. In fact, DHS has determined that those truckers who already have an HME endorsement will “*only*” have to pay \$105.25 for the TWIC. That is \$105.25 on top of the \$94-\$129 that the trucker is already paying for an identical background check as the HME requires.

Again, the background requirements for the HME and TWIC are identical. It is clear that the left hand does not know what the right hand is doing, and small business truckers get caught in between paying the tab. Truck drivers who are getting an HME should also qualify for a TWIC without paying additional, redundant and exorbitant fees to the federal government because those crafting and enforcing the regulations within these government agencies do not talk with each other, or fully consider the impact that such redundant behavior will have on small businesses.

Finally, and as important, it should be noted that along with the financial cost of compliance for HME and TWIC, valuable time and resources are expended by small business truckers. Many times these men and women are required to give up work days and income to travel to specific locations, often times far from their homes to apply for each card. This is lost time and income that was never considered by the TSA. If two applications with similar requirements are necessary, that doubles the time, and loss of income needed for the small business trucker to comply. Bottom line, these men and women should not be penalized because of the lack of communication between, and within, government agencies.

OOIDA believes that clarification from Congress will break down the jurisdictional walls that prevent agencies from working together to reduce the burden of its rules on small businesses. We look forward to continuing our work with the Small Business Committee on these and other important issues.

In conclusion, small business trucking professionals support regulations that promote a safe and efficient industry as well as rules that safeguard our national security interests. However, they expect the federal government to implement regulations with some level of common sense and fairness and take into consideration the tremendous economic impact and operational burdens that regulations it promulgates may have on the small businesses that drive our economy.

Chairwoman Velazquez, Ranking Member Chabot and distinguished members of the Committee, thank you for your consideration of this testimony. I would be pleased to answer any questions that you may have.